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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION

Case No. 21-MD-02992-GPC-MSB

REPLY BRIEF IN SUPPORT OF DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO EXCLUDE PURPORTED EXPERT OPINIONS OF DAVID I. LEVINE (ECF 566)

Date: April 17, 2026
Time: 1:30 p.m.
Ctrm: 12A – 12th Floor
Judge: Hon. Gonzalo P. Curiel

FILED PROVISIONALLY UNDER SEAL PURSUANT TO STIPULATED PROTECTIVE ORDER

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BANA moved to exclude David Levine's opinion on the damages supposedly suffered by the class for a very fundamental reason: Levine does not actually *have* an opinion on the damages (if any) suffered by the class. *See* ECF 566-1 (Mot.).[1] What he has is a shot in the dark. He proposes to award the class damages based on the amount it would, hypothetically, have cost them to incur credit-card debt at a 15.9% interest rate—[redacted], but because he imagines they were harmed by *other* things he did not (and could not) measure. So, as between credit-card interest rates he can measure and damages he cannot, Levine offers an opinion on the former. But that opinion does not even pretend to be a reliable way of measuring the latter.

Levine concedes he considered no data or information on actual class member behavior or actual class member harms. He does not claim that his damages calculations apply to every class member, or to *any* class member—just some portion he imagines (without any empirical support) to constitute a "majority." But he acknowledges myriad circumstances which could place some unknown and unknowable portion of the class *outside* that "majority." And even *within* the imagined majority, Levine does not claim that his damages calculation is accurate or reliable. To the contrary, he proffers its very unreliability as a feature rather than a bug, because his guess is "conservative." As *Daubert* requires a *reliable* method, not a conservative one, his unreliable opinions should be stricken from the record.

ARGUMENT

Plaintiffs' opposition brief undercuts their own purported expert right from their statement of the generic legal standard. They say, "An expert's testimony should be admitted where Plaintiffs' damages model for assessing consequential

[1] BANA has also moved to exclude the opinions of Plaintiffs' other purported damages experts, Chloe East and Greg Regan. *See* ECF 565, 567. All three opinions suffer from the same basic defect: offering opinions based on interest rates not "supported . . . with evidence showing that the[ir] assumptions are true as to most or even any" class members. ECF 494 at 88. BANA thus incorporates the arguments made in its other Motions and Replies as equally applicable here.

damages . . . is attributable to their theory of liability and can be calculated for the class as a whole." ECF 617 (Opp.) at 6 (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013)). But Levine already admitted that his damages model does *not* apply to "the class as a whole"—only to his imagined "majority." *See* HX 36 39:2-6. And Plaintiffs' citation to *Comcast* is also self-defeating. Plaintiffs argue that "[c]ourts routinely reject attempts to exclude expert testimony on the ground that the testimony is 'speculative,'" (Opp. 11), yet *Comcast* expressly rejects Plaintiffs' logic:

> The Court of Appeals simply concluded that respondents "provided a method to measure and quantify damages on a class-wide basis," finding it unnecessary to decide "whether the methodology was a just and reasonable inference or speculative." Under that logic, at the class-certification stage any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity.

569 U.S. at 35-36 (citation and brackets omitted).

That describes the problem here. There is no disagreement that Levine's damages formula "*can* be applied classwide." *Id*. (emphasis added). After all, it is barely even a formula at all—he just proposes taking every class member's claim amount and multiplying it by 15.9%. So, the arithmetic "can" of course be done. The dispute here is not about whether multiplication tables exist, but whether this two-factor multiplication problem actually corresponds to reality—whether class members actually suffered damages equal to the products of Levine's equations.

Plaintiffs do not even *try* to argue that they have, and instead argue that they should not be obliged to make that showing at all. They claim it suffices for Levine to estimate the "average" damages suffered across the class rather than the "amount of damages suffered by each individual class member," because it is "permissible" to base a damages model on "classwide (or 'aggregate') approximations" and "average[s]." Opp. 4, 12, 15. This argument is faulty on multiple fronts. As a threshold matter, Plaintiffs cannot defend Levine's method as a mere exercise in averaging or aggregating, because that is not responsive to the objection that his figures are untethered to any harms actually suffered. Separately, aggregate damages calculations do *not* carry the *Comcast* burden of producing a reliable classwide damages methodology where the harms suffered (if at all) by individual class members vary and no method is proposed to account for those variations.

An "aggregate" damages figure is, by definition, merely a sum of individual damages figures. *See, e.g.*, 28 U.S.C. § 1332(d)(6) (amount in controversy "[i]n any class action" is the "aggregate[] of "the claims of the individual class members"). If the individual damages figures that comprise the aggregate are not reliable, then the aggregate is not reliable either. So, for Levine's opinion to clear the *Daubert* threshold on the ground that it measures aggregate damages, Plaintiffs must first show that the figures being aggregated are *themselves* reliable.

As already shown, however, Levine, by his own admission, has no opinion on that question. He does not know if any of the class representatives suffered damages in the amounts yielded by his method. *See* Mot. 5, 14-15 (citing testimony). He does not know how many (if any) class *members* suffered damages in the amounts yielded by his methods. *See id*. He does not believe his methods are even *capable* of measuring the damages experienced by any individual class member. *See id*. 14-15. This is fatal. *See*, *e.g.*, *In re Optical Disk Drive Antitrust Litig.*, 303 F.R.D. 311, 321 (N.D. Cal. 2014) (ruling that "plaintiffs fail to show the expert reports answer the critical questions" in "calculating damages" because the expert proposed to calculate damages "in the aggregate" without "attempt[ing] to show that all or nearly all [class members] were [damaged] in that amount, or in any amount at all"); *In re Apple iPhone Antitrust Litig.*, 2022 WL 1284104, *6-7 (N.D. Cal. Mar. 29, 2022) (striking damages methodology where model did not reliably measure individual damages of class members and let to "absurd results").

Levine's opinion is being proffered to carry Plaintiffs' *Comcast* burden with opinions on the cost of credit-card borrowing, but this Court already held that this method "does not support a damages model that satisfies *Comcast*" because it "is based on assumptions rather than evidence establishing each cardholder's experience," and the assumption that "impacted cardholders would likely have needed" to "utiliz[e] credit cards" was not "supported [] with evidence showing that these assumptions are true as to most or even any of the EDD cardholders[]." ECF 494 at 87-88. Levine, likewise, does not supply evidence that this assumption is "true as to most or even any" class members. He does not base his proposal to measure damages by credit-card interest rates on any belief (much less data) [redacted]. Rather, his expressly stated position is that he does not *know* if they did, but he believes they were damaged in some *other* way that he cannot measure. *See* Mot. 11-12 (quoting testimony).

Unable to deny this, Plaintiffs maintain that "Levine's testimony need not be based on each class member's individual financial circumstances to be admissible." Opp. 11. But Plaintiffs *do* need to demonstrate that Levine's assumptions are valid on the individual level in order to proffer them as valid in the aggregate. *See*, *e.g.*, *In re Optical Disk Drive*, 303 F.R.D. at 321; *In re Apple iPhone*, 2022 WL 1284104, *16 ("plaintiffs may rely on aggregate damage estimates, but must also establish that there is a method, common across the class, for arriving at individual damages") (internal quotation omitted); *Utne v. Home Depot USA, Inc*., 2022 WL 16857061, *5, *7 (N.D. Cal. Nov. 10, 2022) (granting motion to strike "aggregate" damage calculations because "neither model here purports to derive a total award from a sum of individual class members' awards" and "[w]ere the jury to return an aggregate award, it would 'not be possible to know which [class members] are entitled to share in the award,' or how much each should receive"); *Medlock v. Taco Bell Corp.*, 2015 WL 10791410, *6 (E.D. Cal. Dec. 11, 2015) (rejecting damages methodology based on "aggregate [] figures . . . instead of the actual rates" applicable to the class members); *In re Flash Memory Antitrust Litig.*, 2010 WL 2332081, *10 (N.D. Cal. June 9, 2010) (rejecting methodology that "look[s] only at an *average price trend*," ignoring "individual variances").[2]

Recognizing these problems, a few pages later in the same brief, Plaintiffs insist that "Levine *has* explicitly reckoned with potential variations in the time value of money to the particular population at issue." Opp. 15 (emphasis added). The citation Plaintiffs supply in support of this proposition is to Paragraphs 9 to 11 of Levine's Report. The Court can scour them in search of any "reckon[ing] with potential variations" among class members and find no trace of it:

> 9. Using an aggregate measure of harm is common practice in the field of economics, and aggregates are an appropriate way to represent classwide harm.
>
> 10. The harm suffered by class members who were deprived of their UI benefits cannot be represented only by the principal amount of the benefits they were denied. UI recipients who were denied their benefits also suffered harm caused by the delay itself, which can be described as the "opportunity cost" faced by individuals in the absence of UI.
>
> 11. In my opinion, a compound interest rate is an appropriate way of measuring this opportunity cost. Specifically, a compound interest rate, applied to the principal amount of delayed funds and the length of time those funds were inaccessible, is an appropriate way to measure the harm caused by the Bank's policies and practices.

HX 35 ¶ 9-11. The "potential" for "variations" is not even mentioned. Levine is very expressly attempting to do the *opposite*: far from "reckon[ing] with potential variations," he is trying to proffer a justification for *avoiding* that reckoning.

But the proffered justification does not help Plaintiffs. It may in fact be "common practice in the field of economics" to measure harms in the "aggregate." But that says nothing about whether the measure is a *reliable* one. And it likewise says nothing about its "fit" to the case, since "scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S., 579, 591 (1993). Even if a competent economist proffers a reliable measure of harm on an aggregate basis, that does not mean it

[2] *Accord*, *e.g.*, *Reed v. Advocate Health Care*, 268 F.R.D. 573, 591 (N.D. Ill. 2009) (collecting cases rejecting "reliance on averages" absent evidence "all members of the proposed class suffered" the same harms); *In re Processed Egg Prods. Antitrust Litig*., 312 F.R.D. 124, 159 (E.D. Pa. 2015) ("The case law understandably allows for averages and aggregations, but only if the court is convinced that the averages and aggregations are not masking individualized issues.").

suffices to carry Plaintiffs' *Comcast* burden.

But Levine's proposed "aggregate" rests on nothing reliable. The above-cited reference to the pablum in Paragraphs 9 to 11 of his report is not the only effort by Plaintiffs to prop up its reliability that falls flat on its own terms. For example, Plaintiffs assert that "Levine analyzed substantial data in formulating his expert opinion on an appropriate interest rate that reflects the 'time value' of the UI benefits that were delayed or denied." Opp. 7. But in fact, Levine analyzed almost *no* such data—as Plaintiffs admit later on in their brief, when they are defending Levine against the charge of failing to consider "sufficient facts or data," and instead of describing the "facts or data" he considered, they merely argue that "experts may rely on 'knowledge and experiences that are not necessarily in the record.'. . . This is exactly what Dr. Levine has done." *Id.* 17. When Plaintiffs refer to Levine considering "data," all they really mean is that he considered general *interest-rate* data. He did *not* consider any data, documents, or information from the class representatives or the class members to see whether that interest-rate data was applicable to them in any way. *See* Mot. 5, 7, 17-19.

The result is that his opinions on the likelihood class members turned to credit-card borrowing are entirely without empirical foundation. Plaintiffs quote Levine's opinion "that it is unlikely that 'the typical class member . . . could fall back on savings to cover expenses the whole time their UI benefits were denied.'" Opp. 4. But Levine considered no data or information pertinent to how likely this is:

- He considered no data on the class representatives, a majority of whom [redacted], and only [redacted] *See* Mot. 5, 7. (Plaintiffs have not withdrawn any of them as class representatives, despite their own expert's stated belief that they are not likely to be "typical" of the class. *See, e.g.*, HX 36 95:25-97:20.)
- He considered no data on how *long* the "whole time" actually *was* in which the payments were delayed, other than relying on how "Plaintiffs' counsel [] informed me that most UI payments in this class were delayed by over a month" and were therefore [redacted] HX 35 ¶ 35. But the assumption that "most" payments were "delayed by over a month" masks the fact that nearly 30% were not, and were paid within 30

days of the dispute—a variation Levine does not account for in any way. *See* ECF 589-1 (MSJ) at 23 n.4.

- He considered no data on any "borrowing" activity by class members and no data on any "other costs" class members occurred. His opinion on how "likely" class members were to incur these costs is a classic opinion "connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).
- He considered no data on the amount of each class member's claim. As economist Victor Stango pointed out (and Plaintiffs do not dispute), in assessing whether a consumer would need to borrow funds to cover a temporarily disputed claim amount, it is highly relevant whether the claim amount is a small one or a large one. *See* HX 40 ¶ 52 (It is also relevant how much they had in savings or other accessible liquid funds, (*see id.* ¶ 48), on which Levine also considered no data.).

Thus, it is unsurprising that while Plaintiffs assert that Levine considered "information concerning this case and the class," (Opp. 7), they cannot actually identify any information "concerning . . . the class" that Levine considered.

Plaintiffs' Opposition also relies on several misstatements (and extreme exaggerations) as to the nature of BANA's challenge. They cite cases for the proposition that it is permissible to base a damages methodology on "approximated value[s]." Opp. 13 n.4. But nothing in BANA's Motion challenged the use of approximations. Rather, BANA challenged the assumption that Levine's 15.9% interest rate (or median-wage figure) is a *reliable and supported* approximation of anything. Mot. 1, 5-7. Plaintiffs also accuse BANA of "argu[ing] that Dr. Levine does not precisely measure each class members' individual damages," then set up a straw man in attributing to BANA an "insistence that the only permissible means of calculating damages requires Plaintiffs to identify with complete certainty the exact quantum of each individual's damages." Opp. 14, 16. But BANA has not faulted Levine for a failing to "precisely measure" individual damages, nor has it suggested "the exact quantum" must be established "with complete certainty." Rather, BANA's challenge is quite nearly the opposite: that Levine's method *does* involve attaching a precise value to every class member's individual damages, but does so without "evidence showing [his] assumptions are true as to most or even any of the EDD cardholders" (ECF 494 at 88)—and without considering the varying circumstances that leave him *admitting* that his method would "overcompensate some class members while undercompensating others." *Opperman v. Path, Inc.*, 2016 WL 3844326, *14 (N.D. Cal. July 15, 2016); Mot. 16-17. This is not a criticism that Levine's figures merely lack "complete certainty." Opp. 16. It is a criticism that they lack evidentiary foundation altogether.

Plaintiffs, therefore, fall back on arguing that Levine's method does not *need* any evidentiary foundation. They cite *Van v. LLR, Inc.*, 962 F.3d 1160 (9th Cir. 2020), for its proposition that "[i]nterest is simply a way of measuring [the] injury, not the injury itself." Opp. 12 n.3 (quoting *Van*, 962 F.3d at 1165). In other words, Plaintiffs are arguing that they do not *have* to evidence any connection between the credit-card interest rate and any class member injuries, because they are not claiming credit-card interest as "the injury," only using the interest rate as a proxy for some *other* unspecified injury. But that merely begs the question whether it is a reliable measure of that other injury—and Levine makes no claim that it is (indeed, he expressly *disclaims* any connection between the two). *See* Mot. 11-12; *In re Optical Disk*, 303 F.R.D. at 321 (rejecting damages analysis because it "assumes the very proposition that the [plaintiffs] are now offering it . . . to show"). Nothing in *Van* supports the notion that damages for lost "time value of money" can be measured by the cost of borrowing on credit cards. *See* Mot. 20. This Court has already held that damages based on the cost of borrowing on credit cards cannot be awarded without evidence that the assumptions about "utilization of credit cards . . . are true." ECF 494 at 88. Plaintiffs' concession that they cannot evidence this is dispositive.

Notably, Levine is *not* actually proposing an "aggregate" damages methodology in the sense contemplated by the case law. An example of an admissible aggregate damages methodology appears in *In re Lidoderm Antitrust Litig.*, 2017 WL 679367 (N.D. Cal. Feb. 21, 2017), an antitrust case alleging "inflated costs for [a] brand name and generic" drug. *Id.* *1. The court there approved an expert's proposal to "take[] an aggregate approach to damages" "based on aggregated purchases—

combining brand only, generic and brand, and then generic only purchases to create aggregating purchasing figures—and then estimating . . . a 'but-for' price" based on the aggregate data. *Id*. *10. The key fact, as that passage indicates, is that the aggregate damages model was still based on *actual data* about individual class members' purchases, fed into an aggregate on which further analysis was performed. Given this, the court (appropriately) questioned whether individual damages could be reliably deduced from the aggregate, and was satisfied that they could be. *See id*. *11 (concluding "damages can be apportioned . . . using[] a pro rata formula based on each [class member's] purchase[s]"). Here, Levine's proposal to measure the aggregate cost of credit-card borrowing is *not* based on any data about class members' actual borrowing, so there is no data that could be used to deduce a distribution rooted in any class member's actual harms (if any). This is no small distinction. It is the difference between aggregate damages and random numbers.

Plaintiffs contend there is "longstanding caselaw holding that expert opinions—particularly the opinions of economics experts—are admissible even when based on 'generalizations' rather than . . . [the] damages suffered by each individual class member." Opp. 12. Nothing in the cases they cite endorses the notion that Plaintiffs are entitled to rely on generalizations with no evidence that those generalizations "are true as to most or even any of the EDD cardholders," as this Court (correctly) required. ECF 494 at 88. The only issue presented in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), was "whether, to obtain class certification under Federal Rule of Civil Procedure 23, class representatives must demonstrate that there is an 'administratively feasible' means of identifying absent class members." *Id*. at 1123. That issue is not presented in this case, and it has nothing to do with the use of "generalizations" in measuring damages on any basis.

The Eighth Circuit's ruling in *Hartley v. Dillard's, Inc.*, 310 F.3d 1054 (8th Cir. 2002), is even further afield. Proffering it to support the notion that Levine need not account for "damages suffered by . . . individual class member[s]" (Opp. 12) raises serious doubts about whether Plaintiffs have even read the case. It was not a class action at all, but an individual employment discrimination case. The expert in question was not opining on damages; rather, the expert opined on whether the plaintiff's job termination could be "justif[ied]" by "declining profits" at the mall where she worked, or whether the claim of declining profits was just a pretext for discrimination. *Hartly*, 310 F.3d at 1058, 1060. Plaintiffs cite it for its ruling that it was appropriate to consider the expert's opinion that "that the financial problems of the McCain Mall store were consistent with what was happening to department stores in malls around the country." *Id*. at 1060. Plaintiffs inexplicably mischaracterize this as holding that it is permissible to base a damages methodology on "generalizations about national trends," (Opp. 13), but the expert was not proffering a damages methodology at all. The case says nothing whatsoever about the circumstances in which damages might be measured in an aggregate or "general" fashion.

The Ninth Circuit has "interpreted *Comcast* to mean that plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Vaquero v. Ashley Furniture Indus., Inc*., 824 F.3d 1150, 1154 (9th Cir. 2016) (internal quotation marks and citation omitted); *accord Comcast*, 569 U.S. at 35 ("a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to th[e] theory" of liability). Plaintiffs' liability case seeks compensation for "the loss of use of money." ECF 494 at 86. Levine proposes to measure damages for that alleged lost use of money by credit-card interest rates, but he does not, and cannot, claim that the payment of credit-card interest is something that "stemmed from the defendant's actions." *Vaquero*, 824 F.3d at 1154. There is thus a fatal mismatch between the theory of liability and the damages model Levine offers. It should be stricken as unreliable and irrelevant.

CONCLUSION

For these reasons and those set forth in BANA's Motion and evident from the record, BANA Levine's report and opinions should be stricken and excluded.

Dated: February 20, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on February 20, 2026. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify under penalty of perjury that the foregoing is true and correct.

Dated: February 20, 2026

s/ Matthew L. Riffee

MATTHEW L. RIFFEE